IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Cause No. 4:17CR00149-2 CDP**
vs	)	
	)	
DARREN SMALL,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR A DOWNWARD DEPARTURE

Comes now, Defendant Darren Small, by counsel, and moves this Court for a downward departure from Criminal History Category II to a Criminal History Category I, pursuant to U.S.S.G. § 4A1.3(b)(1), due to an overstatement of his criminal history. In addition to filing this Motion for a Downward Departure, Small will be filing a Sentencing Memorandum before sentencing asking the Court to vary downward from the applicable guideline range based on 18 U.S.C. § 3553(a).

I. Background

The Government charged Small by Indictment with one count of Conspiracy to Commit Access Device Fraud, in violation of 18 U.S.C. §§ 1029(b)(2) and 1029(c)(1)(A)(i) ("Count I"); one count of Access Device Fraud in violation of 18 U.S.C. §§ 1029(a)(2) and 1029(c)(1)(A)(i) ("Count II"); and one count of Wire Fraud in violation of 18 U.S.C. § 1343 ("Count III"). Pursuant to a written plea agreement, Small pled guilty to Counts I and II, and the Government agreed to move for dismissal of Count III at sentencing.

Small's total offense level was calculated at 12. He received a Criminal History Category II because he committed the instant offense while on probation in St. Louis County Circuit Court for failure to make child support payments, cause number 12SL-CR07809-01. He successfully completed his state probation on April 6, 2016. The advisory guideline range recommended by the Presentence Investigation Report ("PSR") is 12 to 18 months, based on his offense level of 12 and Criminal History Category II.

II. Argument

It is well settled that the Sentencing Guidelines permit a district court to depart from a recommended sentence if it believes that a defendant's criminal history category substantially over represents the seriousness of his criminal record or the likelihood that he will commit further crimes. §4A1.3(b)(1); United States v. Abbott, 30 F.3d 71, 72-73 (7th Cir. 1994). As the Court of Appeals for the Fourth Circuit has explained:

> "'Criminal history' is, relatively, one of the most flexible concepts in the [G]uidelines. While it is possible to classify the severity of current federal offenses with a reasonable degree of precision mathematically accurate evaluation of the countless possible permutations of criminal history, involving offenses of high and petty committed in numerous jurisdictions, would be at best unwieldy. The Sentencing Commission recognized this difficulty, and though it prescribed a mathematical method to calculate the criminal history, it specifically identified overstatement or understatement of the seriousness of the defendant's past conduct as a ground for departure from the raw criminal history score."

United States v. Adkins, 937 F.2d 947, 952 (4th Cir. 1991). Small requests that this Court look past the mathematical procedures found in the Guidelines and look specifically at his criminal history. He received five years of probation for failing to make child support payments which counted one point against his criminal history category. He received two additional points because he was on probation for the child support case when he committed the instant offense. These two additional moved Small into a Criminal History Category II.

The mathematical approach offered by the Guidelines fails to consider several factors that suggest his criminal history is overstated. First, Small's failure to make child support payments was a non-violent offense that arose from an inability to pay child support, not active criminal conduct committed by Small. Second, Small successfully completed that probation, and the overall purpose of his probationary period was to ensure that he paid child support, not to serve as punishment and deterrence from criminal activity. Small's prior offense is more accurately considered as a non-compliance criminal case rather than a criminal offense involving active violations of the law. Per the PSR, Small had a job and earned money prior to his non-support offense. He simply had trouble making payments in addition to paying for the necessities of life for which he needed to pay.

Small requests a downward departure based on an overstatement of his criminal history because the Criminal History Category II in the PSR does not accurately reflect his criminal history. The Sentencing Commission recognized that the Guidelines might not always account for cases such as Small's. Therefore, they designed § 4A1.3 to address situations where a defendant's history places the defendant in a criminal history category usually reserved for those with more serious criminal histories. As noted in paragraph 91 of the PSR, Small's Criminal History Category II substantially over-represents the likelihood that he will commit other crimes. The PSR writer goes on to suggest that a Criminal History Category I may better represent the likelihood that Small will commit further crimes in the future. Small agrees. A downward departure to a Criminal History Category I with a base offense level of 12 would lower Small's advisory guideline range to 10 to 12 months.

III. Conclusion

In sum, a mechanical application of the Guidelines in this case exaggerates the significance of Small's criminal history. Examining his case under the guidance of the above-referenced factors, Small's criminal history is substantially overstated.

WHEREFORE for the foregoing reasons, Small respectfully requests this Court grant his Motion for a Downward Departure depart downward from a Criminal History Category II to a Criminal History Category I, a level that more accurately reflects the seriousness of his criminal history and the likelihood that he will commit other crimes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following.

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